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Judicial Approbation in Building the Civilization of Arbitration

Thomas E. Carbonneau*

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I. INTRODUCTION

The contemporary law of arbitration originated in North America and Europe.¹ Among like-minded States with conflicting legal traditions,

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1. Much of the development of the current law of arbitration took place in the aftermath of WWII. The International Chamber of Commerce (ICC) managers in Paris and other interested parties led the effort to draft the text and foster the acceptance of the New York Arbitration Convention, which was opened for signature in 1958. *See* U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (codified at 9 U.S.C.A. §§ 201-208 (1970)). *See generally* ARTHUR VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981).

France ratified the Convention in 1959. The Court of Cassation played a major role in adjusting the national law to the modern exigencies of the arbitral process. The United States ratified the Convention in 1970; the United Kingdom in 1975; Canada in 1986; Belgium in 1975; Germany in 1961; Spain in 1977; Italy in 1969; and Portugal in 1994 after it enacted a national law modeled upon the 1980 French law of arbitration. The adoption of the Convention, and other international instruments on arbitration, was intended to create a regional consensus on arbitration that would allow international merchants working in the North American-European context to rely on an effective and enforceable transnational legal process. *See* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002) [hereinafter Carbonneau, *Transborder Arbitration*].

arbitration represented a means of transcending the diversity of legal systems. It had the additional advantages of neutrality and enforceability.² Arbitration's regional success and the globalization of national economies eventually gave it a wider, more universal vocation.³ A world law of arbitration emerged and developed.⁴ Not only was it global in application, but its content was modern and sophisticated.⁵ States, admittedly to varying degrees,⁶ had come to the realization that

2. See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION* 214-48 (2005). The differences between national concepts of a legitimate trial—as to the function of the judge and the parties, the constitution of a record, the use and treatment of witnesses and experts, rules of evidence, and the procedure of appeal—could render the transborder rule of law ineffective and paralyzed by a variety of conflicts as to jurisdiction, governing law, and enforcement. See, e.g., PETER HERZOG, *CIVIL PROCEDURE IN FRANCE* 253-365 (1967); RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW* 352-434 (4th ed. 1980); HENRY P. DE VRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 187-201 (1976). See also Pierre A. Karrer, *The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It*, 63-1 *DISP. RESOL. J.* 72 (2008).

3. Over time, more nations in other parts of the world adhered to the New York Convention. There are at least 141 signatory States at the present time. They also adopted the UNCITRAL Model Law on International Commercial Arbitration, making it their national law of arbitration. Available at www.uncitral.org. The General Assembly amended the Model Law in 2006. A/RES./61/33 (64th sess. Agenda Item 77) (Dec. 18, 2006). See HOWARD HOLTZMAN & JOSEPH NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1980). Despite some individual modifications of the paradigmatic statutory framework, the adoptions of the UNCITRAL Model Law created, or began to create, the foundation for a world law on arbitration. See, e.g., *ARBITRATION LAW IN GERMANY: THE MODEL LAW IN PRACTICE* (Karl-Heinz Böckstiegel, et al. eds., 2007); Robert Morgan, *The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia*, *ASIAN DISP. REV.* (H.K.) 32 (Jan. 2008).

4. See generally JULIAN D. M. LEW, LOUKAS A. MISTELIS, & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003); PIETER SANDERS, *THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION* (2001).

5. See PETER BINDER, *INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL JURISDICTIONS: AN INTERNATIONAL COMPARISON OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* (2000); ARON BROCHES, *COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* (1990).

6. See ISAAK DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE* (1993); Andre J. Brunel, *A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law*, 25 *TEX. INT'L L.J.* 43 (1990); Burnard, *The New Zealand Law Commission's Report on the UNCITRAL Model Law*, 8 *ARB. INT'L* 281 (1992); Octavian Capatina, *L'application en Roumanie de la loi-type et du Règlement d'arbitrage de la CNUDCI*, 9 *ANN. HAGUE DR. INT'L* 11 (1996); Croft, *Australia Adopts the UNCITRAL Model Law*, 5 *ARB. INT'L* 174 (1988); Alejandro M. Garro, *The UNCITRAL Model Law and the 1988 Spanish Arbitration Act: Models for Reform in Central America*, 1 *AM. REV. INT'L ARB.* 201 (1990); Hamid G. Gharavi, *The 1997 Iranian International Commercial Arbitration Law: The UNCITRAL Model Law à L'Iranienne*, 15 *ARB. INT'L* 85 (1999); Kaplan, *Hong Kong and the UNCITRAL Model Law*, 54 *ARB.* 173 (1988); Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, 6 *J. INT'L ARB.* 7 (1989).

their participation and that of their nationals in the world marketplace should only be undertaken with the adjudicatory guarantees of arbitration.⁷ In a word, international commercial arbitration (ICA) was vital to transborder commerce; it supplied international merchants with a functional and effective transnational adjudicatory process.⁸ In some measure, albeit with differences in the volume and diversity of transactions and the character of institutional regulation, modern-day ICA represented a return to the practices of the medieval trade fairs.⁹

Ratification of the New York Arbitration Convention¹⁰ and adoption of the UNCITRAL Model Law on International Commercial Arbitration¹¹ expressed a State's formal endorsement of, and commitment to, arbitration. These, however, were merely the first steps in becoming a hospitable-to-arbitration jurisdiction. To parse Noam Chomsky,¹² arbitration statutes are but a surface manifestation of the status of arbitration in a particular legal system. Current practice reveals that legislative endorsements can consist of facile rhetoric and constitute a mere symbolic gesture of adherence.¹³ The measure of a State's

7. This awareness was especially marked in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), as well as in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). See also RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* (1985); P. FOUCHARD, E. GAILLARD, & B. GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., 1999); Charles N. Brower, *The Global Court: The Internationalization of Commercial Adjudication and Arbitration*, 26 U. BALT. L. REV. 9 (1997); Henry de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982). See generally Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183 (2004).

8. See generally Carbonneau, *Transborder Arbitration*, *supra* note 1.

9. See generally LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., rev. ed. 1998).

10. See *supra* notes 1, 3 and accompanying text.

11. See U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 1; UNCITRAL Model Law on International Commercial Arbitration, *supra* note 3.

12. Noam Chomsky is known as the father of modern linguistics for his work on generative and transformational grammar. See, e.g., NOAM CHOMSKY, *REFLECTIONS ON LANGUAGE* (1975); NOAM CHOMSKY, *TOPICS IN THE THEORY OF GENERATIVE GRAMMAR* (1966); NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* (1965); NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1957).

13. See Ricardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 RECUEIL DES COURS 9 (1977). For example, it is unlikely that the ratification of the New York Arbitration Convention will prevent national courts in developing or re-emerging States, possibly at the behest of the executive branch, from protecting local companies from efforts by MNEs to enforce arbitral awards against them. The Cairo Court of Appeal's decision to set aside an ICC rendered against the Egyptian Air Force in *Chromalloy* attests to the parochialism and protectionism that is just below the surface of globalism. See *In the Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). On *Chromalloy*, see Hamid G. Gharavi, *Chromalloy: Another View*, 12 MEALEY'S INT'L ARB. REP. 21 (1997); Jan Paulsson, *Rediscovering the N.Y.*

support for arbitral adjudication—the so-called deep structure¹⁴ in Chomsky's terminology—resides in the judicial implementation of the regulatory provisions on arbitration. Proverbially stated, the daily activity of melding the proclaimed law to the circumstances of actual litigation is where the “rubber meets the road.” The courts construe the decisive issues of the law and practice of arbitration from the vantage point of specific disputes, parties, and transactions. The policy that guides the judicial decision-making on matters of arbitrability,¹⁵ the powers of the arbitrator,¹⁶ and the enforcement of arbitral awards¹⁷ is accurate testimony of a jurisdiction's disposition on arbitration. Statutory proclamations gain real meaning in court decisions.

In Western, democratic States, courts, therefore, play a critical part in integrating arbitration into the operation of the legal system.¹⁸ This article describes and assesses the work of three national courts in regard to arbitration. The English experience demonstrates that judicial diffidence toward arbitration and concomitant reverence for the cohesion of substantive law can hamper the acceptance and function of arbitration within the legal system.¹⁹ Despite a vibrant arbitration business in London involving the sale of commodities, maritime transactions, and the provision of insurance,²⁰ the adjudicatory capability of arbitration continues to be suspect in the English legal system.²¹ The distrust of arbitration began with, and has been sustained by, the courts;²² the latter

Convention: Further Reflections on Chromalloy, 12 MEALEY'S INT'L ARB. REP. 20 (1997); Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin*, 11 MEALEY'S INT'L ARB. REP. 22 (1996).

14. See *supra* note 12 and accompanying text.

15. For a description of arbitrability and arbitrability issues, see THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 23-27 (2d ed. 2007) [hereinafter CARBONNEAU, *LAW AND PRACTICE*].

16. For a description of the powers of the arbitrator, see *id.* at 28-30.

17. For a discussion of the enforcement of arbitral awards, see *id.* at ch. 9.

18. See Lane, *The Role of the Legislature and the Courts in the Development of the Arbitration Process*, 52 ARB. 195 (1986). For an illustration, see the contrast of result between the opinion in *Chromalloy*, 939 F. Supp. 907, and *Spier v. Calzaturificio Tecnica, S.P.A.*, 77 F. Supp. 2d 405 (S.D.N.Y. 1999). See also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

19. See *infra* text accompanying notes 33-73.

20. See ALAN REDFERN & MARTIN H. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (3d ed. 1999); Lord Justice Saville, *The Arbitration Act 1996*, [1997] LLOYD'S MAR. & COM. L.Q. 502.

21. See *Arbitration Act 1996* §§ 45, 69, & 87; see also CARBONNEAU, *LAW AND PRACTICE*, *supra* note 15, at 561-65.

22. See Lord Hacking, *The “Stated Case” Abolished: The United Kingdom Arbitration Act of 1979*, 14 INT'L LAW. 95 (1980); William W. Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21

have been preoccupied with preserving their interpretative authority in regard to English commercial law.²³

The French and American experiences attest to a contradistinctive use of judicial authority in regard to arbitration. In both legal systems, the courts have been instrumental to the elaboration of a receptive and accommodating law on arbitration.²⁴ In these legal systems, legislative enactments are used as a springboard for developing a judicial policy and decisional practice that greatly favor the arbitral process and its effective implementation.²⁵ In each system, the courts performed a legislative function in which they gave voice to an interest that they believed to be vital to the national welfare.²⁶ Although the courts exceeded the bounds of their legitimate institutional power, they fashioned a policy and creatively applied it by forging a fully functional law of arbitration.²⁷ ICA would not have risen to its level of prominence without the decisional rulings of the French Court of Cassation²⁸ or the U.S. Supreme Court.²⁹ Moreover, domestic adjudication within the United States was irretrievably altered by the American High Court's endorsement of arbitration.³⁰ At least in the United States, and perhaps elsewhere as well, lobbying and the pressure of campaigning at times rendered the legislative branch incapable of envisaging and pursuing the national interest.³¹ Be that as it may, the high courts in both France and the United States continue to pursue vigorously the elaboration of a liberal, pragmatic, and adaptive law of arbitration.³²

HARV. INT'L L.J. 87 (1980) [hereinafter Park, *Judicial Supervision*]; Steyn, *England*, 8 Y.B. COM. ARB. 3 (1983).

23. See Clive Schmitthoff, *The Supervisory Jurisdiction of English Courts*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 289 (P. Sanders ed., 1967).

24. See *infra* text accompanying notes 74-179.

25. See *infra* text accompanying notes 74-76, 120-26, 132-41, 151-67.

26. See *infra* text accompanying notes 95-100, 178-79.

27. See *infra* text accompanying notes 95-100, 178-79.

28. See Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1 (1981) [hereinafter Carbonneau, *Elaboration*].

29. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 58-76.

30. See *id.* at xv-xxiv.

31. See generally THOMAS E. MANN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006); ALAN L. MOSS, SELLING OUT AMERICA'S DEMOCRACY: HOW LOBBYISTS, SPECIAL INTERESTS, AND CAMPAIGN FINANCING UNDERMINE THE WILL OF THE PEOPLE (2008).

32. In a judgment dated February 1, 2005, the Court of Cassation upheld the Paris Court of Appeal ruling in *NIOC v. Israel*, recognizing NIOC's right to have a French court appoint an arbitrator in circumstances in which the State of Israel was unwilling and/or prevented by law from appointing its arbitrator. The exercise of French judicial authority was intended to avoid a prospective denial of justice. See Judgment of Feb. 1, 2005, Cass. Ire civ., Fr., Juris-Data No. 2005-026746, J.C.P. No. 11 (Mar. 17, 2005). For

II. THE ENGLISH EXPERIENCE

The history of English arbitration law exemplifies the use of judicial supervision to safeguard society from the possible decisional imperfections of arbitral rulings. After all, arbitrators are but lay experts, often merchants, who ignore and may be insensitive to the refinements and intricacies of professional adjudication.³³ English courts have long perceived arbitration as an inferior remedy—a murky and shallow reflection of judicial justice. From a historic perspective, they viewed unschooled arbitrators as prone to ineptitude.³⁴ These merchant judges could operate only in a makeshift, truncated process of adjudication. As early as eighteenth century practice, English courts entertained common law petitions against arbitral awards; in these pleadings, the parties could challenge either the arbitrators' factual determinations or legal conclusions.³⁵ Upon a finding of error, the King's Bench would vacate the entire award. It was the only sanction available to rectify a would-be mistake.³⁶ Over time, the extreme consequence of a successful challenge to an award encouraged arbitrators to engage in self-protective behavior. In order to minimize judicial supervision, they began to render awards without any reasoned legal explanation for their determinations, thereby restricting the possibility of judicial vacatur to evident factual error.³⁷ The practice, one suspects, might have generated over time the perception that arbitrators were primarily, if not exclusively, finders-of-fact rather than theologians of law.

The Common Law Procedure Act of 1854 attempted to counter the arbitrator practice of rendering so-called unreasoned awards.³⁸ It introduced the "special case" (also known as the "stated case" or "case stated") procedure, under which arbitrators were authorized to refer a legal question that arose in an arbitration for court decision.³⁹ The procedure was intended to quell arbitrator apprehensions about judicial supervision and, yet, assure that courts continued to be the exclusive oracles of the law. Whether a legal question should be referred to the

the U.S. Supreme Court, see *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 552 U.S. ____ (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008).

33. See generally Mayer, *Les réactions de la doctrine à la création du droit par les juges en droit international privé*, 31 TRAVAUX DE L'ASSOC. HENRI CAPITANT 385 (1980); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

34. See generally Mayer, *supra* note 33; Wolaver, *supra* note 33.

35. See Hacking, *supra* note 22, at 96.

36. See *id.*

37. See *id.*

38. See Common Law Procedure Act, 1854, 17 & 18 VICT. (cited in Hacking, *supra* note 22, at 97).

39. See Common Law Procedure Act, 1854, § V, at 978.

courts was within the arbitrator's discretion—at least, at this stage in the evolution of the process.⁴⁰ Moreover, the case law prohibited contracting parties from revoking the arbitrator's referral discretion in their agreement:

This is done in order that the Courts may ensure the proper administration of the law by inferior tribunals. In my view, to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no *Alsatia* in England where the King's Writ does not run.⁴¹

The court's reasoning emphasized the importance of achieving adjudicatory results through the proper application of law and the essential role the courts played in realizing that objective. Similarly, contracting parties could not authorize arbitrators to rule in equity instead of law.⁴² Given the division between law and equity and the nature of equity, courts were unable to supervise arbitral awards rendered on the basis of arbitrator perceptions of fairness.⁴³ The relationship between arbitration and the courts had all the trappings of a Cinderella story or a Dickens novel. Arbitral tribunals were thought of as the step-children of the legal process, and it was believed that they should recognize their disabilities and lowly status and allow courts to supply the lawful conclusion to litigation.

Obviously, the foregoing developments reinforced the judicial power to oversee the determinations reached by arbitrators. The public interest in law application and adjudication demanded that courts have the authority to revisit all aspects of adjudication achieved through arbitration. The arbitral process, therefore, had little integrity and was, for all intents and purposes, devoid of real autonomy and independence. The integrity of law was seen as the primary and overriding value.

The Arbitration Act of 1950 sought to ameliorate the standing of arbitration under English law.⁴⁴ The Act conferred greater legitimacy upon the process and proclaimed arbitration agreements to be lawful and enforceable contracts.⁴⁵ Moreover, by leave of court, arbitral awards could be enforced like judicial judgments⁴⁶ because they were entitled to the same binding effect as court rulings. The grounds for challenging arbitral awards were limited to irregularities in the conduct of the

40. *See id.*

41. *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478, 488 (C.A.).

42. *See Schmitthoff, supra* note 23.

43. *See id.*

44. *See* Arbitration Act, 1950, 14 Geo. 6, ch. 27, *reprinted in* 2 INTERNATIONAL COMMERCIAL ARBITRATION, Doc. VII E. 1, 129-49 (C. Schmitthoff ed., 1983).

45. *Id.* at § 26.

46. *Id.*

proceedings and the commission of fraud in securing an award.⁴⁷ Unfortunately, the 1950 Act also provided for the judicial review of the merits of arbitrator determinations.⁴⁸ The availability of this form of judicial supervision impeded the full rehabilitation of arbitration under English law.

The 1950 Act adopted the old common-law writ procedure.⁴⁹ An award could be set aside for an "error on its face" (*i.e.*, when a manifestly erroneous legal conclusion was evident on the face of the award).⁵⁰ The arbitrators' practice of not providing reasons for their determinations, however, eliminated the supervisory force of this procedure. The Act also codified the stated case procedure which became, in effect, the primary means in England of effectuating the judicial supervision of awards.⁵¹ The statute provided two forms of judicial supervision for questions of law—a "consultative case" that applied to legal questions that arose during the arbitral proceedings, and a case for "alternative final awards" that applied to the arbitrator's statement of legal questions at the end of the arbitration.⁵² Under either procedure, the arbitrator could state the case to the court, or the High Court could order the arbitrator to state the legal question to it.⁵³ Additionally, an arbitrating party could seek a court order to compel the arbitrator to state a case when the arbitrator refused to do so.⁵⁴

The stated case procedure, therefore, became more coercive and increasingly compromised the arbitrator's decision-making role. The Court of Appeal eventually determined that a court could order an arbitrator to state a case, even when the latter objected to it.⁵⁵ In other

47. *Id.* at § 24. The legislation attributed standard adjudicatory powers to arbitrators by allowing them to administer oaths and to hear the parties and witnesses under oath. The arbitrators were authorized to issue subpoenas against any party, but only to the extent available in an ordinary judicial action. *Id.* at § 12(4). The attribution and recognition of such powers enhanced the systemic standing of arbitration as an adjudicatory remedy. The Act also commanded that the courts assist the arbitral process when coercive legal authority became necessary. *Id.* at §§ 10, 12(6), 13, and 23. Providing for the judicial enforcement of discovery orders, the judicial removal of ineffective arbitrators, or the judicial extension of time limits for arbitration, further enhanced the legitimacy of arbitral adjudication under English law.

48. *Id.* at § 21.

49. See Park, *Judicial Supervision*, *supra* note 22, at 91-92.

50. See Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 42 n.30 (1984) [hereinafter Carbonneau, *Arbitral Adjudication*].

51. See Park, *Judicial Supervision*, *supra* note 22, at 92.

52. See *id.*

53. See *id.*

54. See *id.*

55. Halfdan Greig & Co. A/S v. Sterling Coal & Nav. Corp., [1973] 1 Q.B. 843 (C.A.) (U.K.) (generally known as *The Lysland* case).

words, some legal questions needed to be stated for judicial resolution as a matter of law, namely, those that were readily defined, controversial, and suitable for judicial debate and decision.⁵⁶ Courts gave these characteristics their content. Also, it was mandatory that legal questions that would decide the outcome of litigation be stated to the court.⁵⁷ As a consequence, judicial supervision of arbitration was heightened. An arbitrator's would-be unreasonable refusal to state a case or to seek an order directing that a question of law be referred to a court, usually demanded by the likely disfavored party, could lead to the nullification of the award. Such behavior amounted to "arbitrator misconduct."⁵⁸ This development, in effect, thwarted the parties' original intent to seek an arbitral resolution of their disputes and it fostered the resort by disappointed parties to undermining dilatory tactics.

Despite its stated objective and content, the 1950 Act did little to advance the independent operation and autonomy of arbitration under English rules. While arbitration may not have been "bastardized" adjudication, it was far from being a respected and trustworthy co-equal of judicial litigation. English law permitted arbitrators to assemble the facts of a dispute, but it had little, if any, confidence in the arbitrators' ability to determine, apply, or interpret legal rules.⁵⁹ As a consequence, it gave parties the right to have arbitrator determinations on the law reconsidered by a court. Appeal on the basis of questions of law became standard procedure in arbitral practice.⁶⁰ The integrity of English commercial law was of paramount importance.

The two latest English statutes on arbitration,⁶¹ the Arbitration Act 1979 and the Arbitration Act 1996, represent a radical departure from the policy of wide-ranging English judicial supervision of arbitral awards. The recent legislation repealed an entire section of the 1950 Act and abolished the High Court's common law jurisdiction to vacate an award

56. *Id.* at 861-62.

57. *Id.*

58. See Park, *Judicial Supervision*, *supra* note 22, at 94.

59. According to Lord Hacking, "[t]he traffic over this [the case-stated] bridge greatly assisted the evolution of English commercial law. In contrast with other countries, such as the United States where commercial law has developed separately under the awards of the arbitrators and court judgments, England developed one commercial law." Hacking, *supra* note 22, at 98.

60. *Id.*

61. Arbitration Act 1979, c. 42, reprinted in 5 Y.B. COM. ARB. 239-46 (P. Sanders ed., 1980); Arbitration Act 1996, c. 23, available at http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960023_en_1. On the 1979 Act, see sources cited *supra* note 22; on the 1996 Act, see ROBERT MERKIN, ARBITRATION ACT 1996 (Lloyds Commercial Law Library) (3d ed. 2005); MARTIN H. HUNTER & TOBY LANDAU, THE ENGLISH ARBITRATION ACT 1996: TEXT AND NOTES (1998); Lord Justice Saville, The Arbitration Act 1996, [1997] L.M.C.L.Q. 502.

for manifest error of fact or law.⁶² Moreover, it replaced the stated case procedure with a limited right of appeal to the High Court.⁶³ The latter can only be invoked with the consent of the opposing party or by leave of court.⁶⁴ The court's permission will only be granted in exceptional circumstances in which the determination of the legal question "could substantially affect the rights of one or more parties."⁶⁵ Further appeal to the Court of Appeal can only be undertaken if the High Court certifies the matter as one of "general public importance"⁶⁶ or for some other "special reason."⁶⁷ The High Court can also order the arbitrator to state the reasons for the decision,⁶⁸ and a legal question that arises during an arbitration can be referred to a court at the request of the arbitrator or when all the parties make such a request.⁶⁹

In the English experience with arbitration, the judiciary acted as a barrier to arbitration's full development and acceptance as an adjudicatory mechanism. English courts engaged in supervisory practices that prevented arbitration from operating autonomously. Arbitral determinations were subject to *de novo* review by courts. Eventually, courts could command arbitrators through the stated case procedure to refer legal questions for judicial resolution even though the English legal system had legislatively upgraded the status of arbitration. Judicial second-guessing of arbitrator rulings on the basis of law compromised the effectiveness of both arbitration and arbitrators.

In the most recent English statutory statement on arbitration, despite its conformity to world regulatory standards on arbitration,⁷⁰ the right of courts to review and revise arbitrator determinations on the law remains in place, although it has been attenuated. English courts seem determined to confine their authority to exceptional matters,⁷¹ but they can—at their discretion—revisit the entirety of the arbitrator's work product. The English legal system continues to harbor misgivings about arbitration and its professional capabilities. The reason for the

62. Arbitration Act 1979, c. 42, § 1(1) (U.K.), reprinted in 5 Y.B. COM. ARB. 239-46 (P. Sanders ed., 1980).

63. *Id.*; see also William Park & Jan Paulsson, *The Binding Force of International Arbitral Awards*, 23 VA. J. INT'L L. 253, 272-73 (1983); William Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 40-41 (1983) [hereinafter Park, *Lex Loci*].

64. Arbitration Act 1979, h. 42, §§ 1(4) and 1(7) (U.K.), reprinted in 5 Y.B. COM. ARB. 239-46; see also Park, *Lex Loci*, *supra* note 63, at 273.

65. See Park, *Lex Loci*, *supra* note 63, at 273.

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 15, at 534-67.

71. *Id.* at 536, 561-65.

minimization of arbitration relates to the preservation of English commercial law. After years of adjustments and gradual improvements through *stare decisis*, the latter has been transformed into the equivalent of a codified law.⁷² Because arbitration functions primarily in mercantile matters, English courts want to avoid the corrosion and possible dismemberment of English commercial law by arbitrators, who have neither the reverence for nor the appreciation of matters legal to maintain the law's cohesion. English law, exceptionally, emphasizes the primacy of substantive law over the need to maintain arbitration's autonomy.⁷³

III. THE FRENCH EXPERIENCE

Prior to the enactment of a modern law of arbitration⁷⁴ in 1980 and 1981, French courts used their interpretive authority to soften the domestic law restrictions on arbitration and adapt the law to the operational exigencies of the arbitral process.⁷⁵ The case law also shielded ICA from the restrictions of domestic law.⁷⁶ Before October 1, 1980, the relevant French Code provisions—true to their nineteenth century heritage⁷⁷—established that the arbitral clause was valid only in a narrow class of commercial transactions⁷⁸ and that arbitral awards were generally subject to broad-gauged judicial review.⁷⁹ Characteristically in civil law systems, judicial appeal involved, or could involve, a *de novo* review of the facts and the law as well as the possibility of introducing new evidence.⁸⁰ The parties could waive their right of appeal.⁸¹ Even when a waiver applied, a form of appeal was still available, although it

72. See *supra* note 59 and accompanying text.

73. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 561-65.

74. Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.). On the contemporary French law of arbitration, see, for example, M. DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE: INTERNE ET INTERNATIONAL (1990); JEAN ROBERT, L'ARBITRAGE: DROIT INTERNE, DROIT INTERNATIONAL PRIVÉ (6th ed. 1993); YVES DERAÏNS & ROSABEL E. GOODMAN-EVERARD, *France*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Jan Paulsson ed. Supp. 1998).

75. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 527-34.

76. See Carbonneau, *Elaboration*, *supra* note 28.

77. See Thomas E. Carbonneau, *The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980*, 4 HASTINGS INT'L & COMP. L. REV. 273, 275-76 (1981) [hereinafter Carbonneau, *Reform*].

78. See C. CIV. art. 2061 (Code Dalloz ed. 1979-1980) (Fr.); Art. L. 631 C. COM. (Code Dalloz ed., 1979-1980) (Fr.).

79. See HERZOG, *supra* note 2, at 532.

80. See *id.*; see also Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.), art. 42; N.C.P.C. art. 1023 (Fr.).

81. See Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.), art. 42; N.C.P.C. art. 1010 (Fr.).

was less expansive.⁸² When an award was vacated on this basis, the court could render a judicial judgment on the matter—unless the parties jointly agreed otherwise.⁸³ Given litigious dispositions, mutual agreement to return to arbitration was unlikely at this stage of the process. The provision represented an attempt by the enacting legislature to salvage a situation that had gone badly.⁸⁴ It had the disadvantage, however, of eliminating the initial agreed-upon recourse to arbitration.

Further, the older French law on arbitration restrained the arbitrability of disputes on the basis of subject matter,⁸⁵ imposed a time-limit on proceedings,⁸⁶ prohibited the government and its agencies from engaging in arbitration,⁸⁷ and required that awards include a reasoned explanation of the determinations they contained.⁸⁸ Moreover, the code provisions on arbitration did not recognize the separability⁸⁹ or *kompetenz-kompetenz*⁹⁰ doctrines, both of which are instrumental to the autonomy of the arbitral process and to the arbitrator's judge-like stature.⁹¹ Court determination of challenges to arbitral jurisdiction constituted a judicial intrusion upon the arbitral process.⁹² Finally, the law was unclear as to when an arbitral award acquired *res judicata* effect;⁹³ the courts generally held that finality took place only after a

82. See Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.), art. 44; N.C.P.C. art. 1028 (Fr.).

83. See Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.), art. 44; N.C.P.C. art. 1028 (Fr.).

84. See Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.), art. 44; N.C.P.C. art. 1028 (Fr.).

85. See C. Civ. arts. 2059 and 2060 (Fr.).

86. See N.C.P.C. art. 1007 (Fr.).

87. See C. Civ. arts. 2059 and 2060 (Fr.); Level, *Compromis d'Arbitrage*, in [1972] Juris-classeur civil II arts. 2059-61, at 4-5.

88. See Decree No. 80-354 of May 14, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.), arts. 31 and 32.

89. See Cass. civ. Ire, May 7, 1963, Fr., Société Gosset c. Société Carapelli, D. Jur. 545 (1963), note Robert; see also Cass. civ., Ire, May 18, 1971, 99 J. DR. INT'L-CLUNET 62 (1972) (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, 5e, Feb. 21, 1964, 92 J. DR. INT'L-CLUNET 113 (1965); Cour d'appel Ire [CA] [regional court of appeal] Paris, Jan. 22, 1957, J.C.P. *Jurisprudence* II No. 10165 (1957).

90. On both of these inter-related doctrines, see CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 26-27.

91. See *id.*

92. See *id.*

93. See Cass. civ., Dec. 22, 1959, D. Jur. 685 (1960) (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, May 19, 1961, J.C.P. II No. 12329 (1961); Judgment of June 29, 1961, [1962] REV. ARB. 59; see also Riotte, *La réforme de l'arbitrage*, 78 LES PETITES AFFICHES 6 (1980) (citing Cour d'appel [CA] [regional court of appeal] Paris,

court confirmed the award,⁹⁴ thereby making the legitimacy of the award depend upon judicial action.

The Court of Cassation⁹⁵ and several major French appellate courts⁹⁶ were keenly aware that international commerce was vital to French economic interests in the aftermath of World War II. Arbitration, in turn, facilitated international commerce by supplying an effective and predictable rule of law.⁹⁷ The Court of Cassation adjusted the dated domestic law to the character of transnational litigation involving the enforcement of international arbitral agreements and awards.⁹⁸ For example, the Court, in a landmark ruling, held that—in transactions involving international commercial arbitration—the arbitral clause was separable from the main contract and, therefore, was unaffected by the main contract's would-be invalidity:

[I]n matters of international arbitration, the arbitral clause, whether concluded separately or integrated in the principal agreement, always presents, except in unusual circumstances, a full juridical autonomy, excluding the possibility that it could be affected by the eventual nullity of the main contract.⁹⁹

In other words, once an international contract included an arbitral clause, the arbitration would take place even if a party alleged that the main contract was unenforceable. The separability doctrine insulated the arbitral process from specious attempts to delay and confound the arbitral litigation.¹⁰⁰

July 6, 1971, D. Jur. 164 (1971)). Legal scholars argued that, once they were rendered, arbitral awards should have *res judicata* effect. The Court of Cassation and the courts of appeal, however, generally ruled that the finality of an award took effect only after it had been confirmed by a court.

94. See *id.*; see also Jean Robert, *La législation nouvelle sur l'arbitrage*, [1980] Dalloz-Sirey, *Chronique*, No. 25, 189.

95. See, e.g., Cass. civ., Nov. 21, 1860, S. Jur., II, 331 (1861) (Fr.); Cass. civ. Ire, May 18, 1971, 99 J. DR. INT'L-CLUNET 62 (1972) (Fr.).

96. See, e.g., Cour d'appel [CA] [regional court of appeal] Paris, 2e, Mar. 2, 1892, 19 J. DR. INT'L-CLUNET 879 (1892); Cour d'appel [CA] [regional court of appeal], Paris, 5e, Feb. 21, 1964, 92 J. DR. INT'L-CLUNET 113 (1965). See generally Carbonneau, *Elaboration*, *supra* note 28.

97. See Carbonneau, *Elaboration*, *supra* note 28, at 5. See generally Carbonneau, *Transborder Arbitration*, *supra* note 1.

98. See, e.g., Carbonneau, *Elaboration*, *supra* note 28, at 31-40.

99. Cass. civ. Ire, May 7, 1963, Société Gosset c. Société Carapelli, D. Jur. 545 [1963] (Fr.).

100. On separability, see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992); *John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1095-97 (11th Cir. 2003); GARY BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION CLAUSES: DRAFTING AND ENFORCING* 108 (2006); Alan Scott Rau, "Separability" in the *United States Supreme Court*, 1 STOCKHOLM INT'L ARB. REV. 1 (2006); Stephen J. Ware,

The French courts also narrowly defined the content and reach of public policy considerations¹⁰¹ that might have an impact upon ICA. For example, the French decisional law shielded transborder cases from the limited validity of the arbitral clause in domestic law.¹⁰² As long as the contract was governed by a foreign law that provided that the clause was a valid contractual agreement, the French courts would recognize the impact of the clause upon judicial jurisdiction and conclude that it precluded the judicial litigation of the matter.¹⁰³ The restricted validity of the agreement was not a part of imperative French law.¹⁰⁴ The courts reached the same conclusion regarding the French rules of exorbitant jurisdiction.¹⁰⁵ These rules attributed exclusive jurisdiction to the French courts in matters involving French nationals.¹⁰⁶ The invocation of these rules could block the enforcement in France of foreign judgments rendered against French nationals.¹⁰⁷ In international litigation cases, the French courts held that the rules of exorbitant jurisdiction could be waived by party agreement and that an agreement to arbitrate amounted to a contractual waiver of the rules as a matter of law.¹⁰⁸ Moreover, the case law exempted international awards from the domestic law requirement of a reasoned explanation for awards.¹⁰⁹

Also, in its early case law, the French courts distinguished foreign arbitral awards from foreign judgments.¹¹⁰ Holding that the contractual foundation of arbitral awards eliminated any link between the awards and foreign law or judicial jurisdiction, the courts determined that foreign awards were not subject to the same stringent enforcement procedure that applied at that time in domestic law to foreign judgments.¹¹¹

Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107 (2007).

101. See Carbonneau, *Elaboration*, *supra* note 28, at 36-40.

102. See Cour d'appel [CA] [regional court of appeal] Paris, 2e, Apr. 10, 1984, 21 J. DR. INT'L-CLUNET 878 (1894).

103. See Chambre des requêtes [Cass. req.] June 21, 1904, 31 J. DR. INT'L-CLUNET 888 (1904) (Fr.); see also Cour d'appel [CA] [regional court of appeal] Alger, 2e, Dec. 27, 1907, 37 J. DR. INT'L-CLUNET 538 (1910); Judgment of Dec. 18, 1913, Cr. d'appel, Ire, Aix, 43 J. DR. INT'L-CLUNET 1218 (1916).

104. See Judgment of June 21, 1904, *supra* note 103.

105. See Judgment of Nov. 21, 1860, *supra* note 95; see also Chambre commerciale et financière [Cass. com.] June 21, 1965, 55 REV. CRIT. DR. INT'L PR. [hereafter R.C.D.I.P.] 477, 478 (1966) (Fr.).

106. See Judgment of Mar. 2, 1892, *supra* note 96; see also Judgment of June 21, 1965, *supra* note 105.

107. See *id.*

108. See *id.*

109. See Cour d'appel [CA] [regional court of appeal] Paris, Dec. 9, 1955, D.S. Jur. 217; Cass. civ., Ire, June 14, 1960, 49 R.C.D.I.P. 393 (1960) (Fr.).

110. See Chambre des requêtes [Cass. req.] July 15, 1928, 24 R.C.D.I.P. 285 (1929) (Fr.).

111. See *id.*

Accordingly, *de novo* review of the ruling was not available against arbitral awards; the latter benefitted from a simplified, less exacting enforcement procedure—the one that applied to French domestic court judgments.¹¹² An inhospitable attitude on this score would have thwarted the economic benefits of international commerce for France. A series of decisions established that, in an enforcement action relating to an arbitral award, French courts could only consider a limited number of factors for purposes of supervision, *i.e.*, whether the parties had the capacity to enter into an arbitration agreement, whether the subject matter of the dispute could lawfully be submitted to arbitration, whether the award was rendered in proper form, and whether the award complied with the fundamental requirements of French international public policy.¹¹³

Additionally, French courts gave the concept of international contract a broad definition.¹¹⁴ According to the French decisional law, an international contract was an agreement linked to various national legal systems and was a means of participating in international commerce.¹¹⁵ If an arbitral clause was incorporated in an international contract, the latter's international character was a sufficient basis for having the arbitration and the arbitral award legally deemed international in scope.¹¹⁶ The arbitration and the award would then be governed by the liberal regime applying to international matters.¹¹⁷ The courts also insulated the process of ICA from the impact of sovereign immunity from jurisdiction.¹¹⁸ Under their reasoning, the interests of the French State could not be pursued effectively if government agents and entities were prevented from arbitrating disputes.¹¹⁹ The State, in effect, would have been excluded from engaging in lucrative international business transactions.

112. *See id.*

113. *See* Carbonneau, *Elaboration*, *supra* note 28, at 26-27.

114. *See id.* at 36-40.

115. *See* Cour d'appel [CA] [regional court of appeal] Paris, June 19, 1970, J.C.P. 1971, II, 16927; *see also* Cass. civ., Judgment of Feb. 19, 1930, S. Jur. 1933, I, p. 41 (Fr.); Cour d'appel [CA] [regional court of appeal] Colmar, Nov. 29, 1968, J.C.P. 1971, II, 16246.

116. *See* Cass. civ. Ire, Jan. 11, 1972, 99 J. DR. INT'L-CLUNET 621 (1972) (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, 5e, Apr. 28, 1976, REV. ARB. 151 [1977] (Fr.); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Ire, Paris, Oct. 24, 1975, 65 R.C.D.I.P. 538 (1976); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Ire, Paris, May 6, 1976, 66 R.C.D.I.P. 718 (1977).

117. *See* sources cited in *supra* note 116.

118. *See* Cour d'appel Ire [CA] [regional court of appeal] Paris, Apr. 10, 1957, 88 J. DR. INT'L-CLUNET 1002 (1958); Cass. civ., Ire, May 2, 1966, D.S. Jur. 525; Cour d'appel Ire [CA] [regional court of appeal] Aix-en-Provence, May 5, 1959, 87 J. DR. INT'L-CLUNET 1077 (1960); Cass. civ., Ire, Apr. 14, 1964, 92 J. DR. INT'L-CLUNET 646 (1965).

119. *See id.*

The foregoing decisional law became the foundation of a new codified law on arbitration, the Decree of May 14, 1980, and the Decree of May 12, 1981.¹²⁰ The first decree revamped the domestic law of arbitration by filling in gaps and providing a more organized and coherent regulatory framework for arbitration.¹²¹ It remedied many of the uncertainties in the application and interpretation of the prior law. The regulation of arbitration was clearer and more focused. Arbitration was recognized as a viable and effective adjudicatory process. It reached final, binding results. Courts were required to assist the process when such assistance was necessary to its implementation and operation.¹²² The second decree addressed international arbitration.¹²³ It represented unprecedented legislation in France. It embodied a very liberal regulatory policy on international arbitration, including giving effect to the concept of "a-national" arbitration and promoting the role of contract freedom in establishing the regime of legal rules for arbitration.¹²⁴ The law also allowed arbitrators to rule pursuant to commercial custom. Further, the contracting parties could invest them with the power to decide as amiable compositors.¹²⁵ The basic judicial function in arbitration was to enforce the parties' intent to arbitrate and to assist the operation of the process.¹²⁶

IV. THE AMERICAN EXPERIENCE

It is well-settled that legislated legal rules are less than infallible declarations of law.¹²⁷ Courts can discover ambiguity and draw contradistinctions in the most ironclad propositions. The two linchpin provisions of the U.S. or Federal Arbitration Act ("FAA"),¹²⁸ §§ 2 and

120. Decree No. 80-354 of May 14, 1980, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], May 14, 1980, p. 1238; [1980] D.S.L. 207 (Fr.); Decree No. 81-500 of May 12, 1981, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], May 12, 1981, p. 1398.

121. See Carbonneau, *Reform*, *supra* note 77, at 276-78.

122. See *id.* at 280.

123. See Carbonneau, *Arbitral Adjudication*, *supra* note 50, at 77.

124. See *id.*

125. *Id.* at 78.

126. *Id.* at 78-79.

127. See ROBERT LUCE, *LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS* (2006); WILLIAM FELLDEN CRAIES, *CRAIES ON LEGISLATION: A PRACTITIONERS' GUIDE TO THE NATURE, PROCESS, EFFECT, AND INTERPRETATION OF LEGISLATION* (2004); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705 (2007); Daniel Greenberg, *The Nature of Legislative Intention and Its Implications for Legislative Drafting*, 27 STATUTE L. REV. 15 (2006); Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990).

128. 9 U.S.C. §§ 1-16. Title 9, §§ 1-14, was first enacted on February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68

10, illustrate the potential significance of the judicial role in the elaboration of an American law of arbitration. FAA § 2 provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹²⁹

Depending upon the predilection of the ruling court, the statutory text has a number of features that could become problematic. First, although it is clear that the rule that is eventually propounded applies to both types of arbitration agreements,¹³⁰ the circumlocution at the outset of the rule could generate discussion about what is intended and the purpose of the statement. For example, why must a transaction evidence commerce? When does a dispute exist or arise? Can all prospective disputes be submitted to arbitration? What is meant by a “refusal to perform the whole or any part thereof”? Second, does the reference to “a contract, transaction, or refusal” contradict in some measure the “in writing” requirement of the rule? Third, what rationale explains the use of the three celebrated adjectives: “valid, irrevocable, and enforceable.” Are they merely redundant? Finally, what specifically are those “grounds” at “law or in equity” that can invalidate or lead to the revocation of a contract?

Likewise, FAA § 10, despite the generally clear underpinnings of the provision, contains numerous examples of potential interpretative uncertainty. It reads:

- a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

Stat. 1233). Chapter Two was added on July 31, 1970 (84 Stat. 692). Two sections were added to Chapter One by Congress in October 1988, and renumbered on December 1, 1990 (Pub. L. Nos. 669 and 702); Chapter Three was added on August 15, 1990 (Pub. L. No. 101-369); and Section 10 was amended on November 15, 1990. *See generally* IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* (1994).

129. 9 U.S.C. § 2. On the FAA and Section 2, see CARBONNEAU, *LAW AND PRACTICE*, *supra* note 15, at 78-80, 99-114.

130. On the types of arbitration agreements, see CARBONNEAU, *LAW AND PRACTICE*, *supra* note 15, at 22.

1. Where the award was procured by corruption, fraud, or undue means.
 2. Where there was evident partiality or corruption in the arbitrators, or either of them.
 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
 4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
 5. Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
- b. The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.¹³¹

The possible weak links in the text are legion. Suffice it to note that the rule seems to be directed exclusively to federal district courts; the key words and concepts ("corruption, fraud, or undue means"; "evident partiality"; "prejudice"; "excess of powers"; "mutual, final, and definite award") are not defined; the notion of a "rehearing by the arbitrators" is not explained; and, lastly, the third-party right to oppose an award is described in opaque language that makes the elaboration of an applicable rule difficult.

There can be no doubt that the foregoing statutory provisions are instrumental to the American legal system's regulation of arbitration. The validity, enforceability, and binding character of arbitration agreements are critical to the effectiveness of the arbitral process, as is

131. 9 U.S.C. § 10. On the provision, see CARBONNEAU, *LAW AND PRACTICE*, *supra* note 15, at 124-27, 359-428.

the enforcement of arbitral awards.¹³² The rules stipulated here are simultaneously the backbone and soft underbelly of the U.S. law of arbitration. If given full effect by the courts, these rules could act as the foundation for a functional process for regulating arbitration, upon which legal practitioners and their clients could rely with confidence. If applied critically by courts that subject the provisions to variegated analytical objections, they could readily become insurmountable obstacles to the effective implementation of the arbitral process.

In point of fact, the courts, under the leadership of the U.S. Supreme Court,¹³³ have anchored the statutory law in a "strong federal policy,"¹³⁴ unequivocally supportive of arbitration in all circumstances. Moreover, courts, again, especially the U.S. Supreme Court, have purged the statutory text of its limitations on the recourse to arbitration and added content that enables the process to operate.¹³⁵ The federal judicial policy favoring arbitration was the Court's invention.¹³⁶ Neither the statute nor its legislative history gave an inkling of—let alone identified—such a phrase or policy.¹³⁷ It originated with the Court's construction of FAA § 2. In that provision, the Court discovered an imperative that demanded the eradication of the judicial hostility to arbitration and an absolute judicial duty to enforce arbitration agreements as drafted by the contracting parties.¹³⁸ The Court declared that the legislative obligation imposed upon courts was to respect and protect the contractual privilege to arbitrate.¹³⁹ As the would-be federal judicial policy on arbitration developed in the case law, FAA § 2 eventually came to house impliedly a federal right to arbitrate, which acquired a preemptory constitutional standing.¹⁴⁰ The express language of the statute notwithstanding, ordinary contract defenses became ineffective against agreements to arbitrate.¹⁴¹ The proclamation of policy was deaf to whispers of ordinary

132. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 57.

133. *Id.* at 70.

134. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-25 (1986); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

135. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 80-95.

136. See *id.* at 58, 69.

137. See *id.* at 69.

138. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mercury Constr. Corp.*, 460 U.S. at 24-25.

139. See, e.g., *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

140. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 74.

141. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999).

legality. The bellows of policy silenced the murmurings of basic analysis.

But for several rulings on principle,¹⁴² FAA § 10 has not had the benefit of extensive or detailed interpretation by the U.S. Supreme Court. Keenly aware of the Court's disposition on matters of arbitration, the lower federal courts have integrated the essential tenets of the "strong federal judicial policy" favoring arbitration into the decisional law addressing vacatur and confirmation actions.¹⁴³ Growing weary of *pro forma* declarations, one federal court described the judicial supervision of arbitral awards as ascertaining whether the arbitrators "did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it."¹⁴⁴ The arbitrator's core function is to rule, to decide the matter and to render a determination in an award. The judicial scrutiny of awards under the statute, then, is far from exacting; most courts merely engage in a perfunctory exercise.¹⁴⁵ Even with the addition of common law grounds by which courts can assess the arbitrator's determination on the merits,¹⁴⁶ very few arbitral awards are vacated.¹⁴⁷ The federal judiciary has never undertaken a rigorous application of the statutory text or discovered disabling problems in its application.¹⁴⁸ With very few exceptions,¹⁴⁹ the standard practice has been to give full legal effect to the arbitrator's decision.¹⁵⁰

142. See *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57 (2000); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

143. See generally CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 359.

144. See *Remmey v. Paine Webber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied* 513 U.S. 1112 (1995) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc'ns Int'l Union*, 973 F.2d 276 (4th Cir. 1992)).

145. See *supra* note 143 and accompanying text.

146. See CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 369-86.

147. See *id.* at 359-63.

148. See *id.* at 359-429.

149. See, e.g., *Patton v. Signator Agency Inc.*, 441 F.3d 230 (4th Cir. 2006) (holding, despite ordinarily being favorable to arbitration, that the arbitrator "manifestly disregarded the law" by holding that a time bar provision in the parties' earlier contract could be implied in their subsequent agreement; contract interpretation usually falls within the arbitrator's sovereign discretion); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir.), *cert. denied* 526 U.S. 1034 (1999) (reconsidered in *Wallace v. Buttar*, 378 F.3d 182 (2d Cir. 2004) (holding that the arbitrator's holding represented either a "manifest disregard" of the law or facts in the case, leading a lower court in *Wallace* to vacate an award on the basis of a "manifest disregard of the facts," in effect, a new ground for vacatur quickly disavowed by the appellate court)); *Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189 (3d Cir. 1993) (weaving together parts of various enacted regulatory provisions to discover a federal policy against oil spills and environmental damage; the reasoning and ruling contradicted the *Misco* standard for applicable public policy and generated a more diffuse and *ad hoc* sense of the concept). It should be noted that California state courts have demonstrated a consistent pattern of nullifying

Even when the law was embryonic, it was clear to the Court¹⁵¹ and the lower federal courts¹⁵² that state law variations could wreak havoc in the “edifice of law”¹⁵³ as it began to take shape. In order to create a uniform national law of arbitration with agreed-upon foundational principles, the Court federalized the law of arbitration by subjecting conflicting state arbitration laws to federal preemption.¹⁵⁴ The Court declared that the FAA applied in federal and state courts¹⁵⁵ and also limited the enactment power of state legislatures on matters of arbitration.¹⁵⁶ States laws that conflicted with the FAA, even when enacted to protect basic legal rights or achieve public policy objectives, were deemed unlawful and unenforceable.¹⁵⁷ A single and singular imperative dominated all determinations.

Another vital Court contribution to the law of arbitration was the expansion of the arbitrator’s jurisdictional authority. The first stage of this doctrinal development came in the form of the statutory arbitrability cases.¹⁵⁸ The confluence of the rulings in *Mitsubishi*,¹⁵⁹ *McMahon*,¹⁶⁰ *Rodriguez*,¹⁶¹ and *Gilmer*¹⁶² established with unmistakable clarity that arbitrators could rule on statutory claims, as well as contract breach

arbitration agreements in disparate-party arbitrations and refusing to apply the severance doctrine to salvage the parties’ basic agreement to arbitrate disputes. *See, e.g.,* *Broughton v. Cigna Healthplans of Ca.*, 988 P.2d 67 (Cal. 1999) (holding that claims for injunctive relief under the California Consumer Legal Remedies Act are inarbitrable, finding an “inherent conflict” between the recourse to arbitration and the primary purpose of statutory remedies intended to prohibit harmful conduct to the general public); *see also* *Abramson v. Jupiter Networks, Inc.*, 9 Cal. Rptr. 3d 422, 422 (Cal. Ct. App. 2004) (“[A]n employee seeking to vindicate unwaivable [public law] rights may not be compelled to pay forum costs that are unique to arbitration.”); *Chin v. Dollar Fin. Group*, 2004 WL 2039794 (Cal. Ct. App. 2004) (finding of unconscionability of the arbitration agreement because of a lack of mutuality and refusal to sever).

150. *See supra* note 15 and text accompanying note 143.

151. *See* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

152. *See* *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959).

153. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283-84 (1995) (O’Connor, J., concurring).

154. *See* CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 155.

155. *See supra* note 151 and accompanying text.

156. *See supra* note 151 and accompanying text.

157. *See* *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

158. On the topic of statutory arbitrability, *see* CARBONNEAU, LAW AND PRACTICE, *supra* note 15, at 216.

159. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

160. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

161. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

162. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

issues.¹⁶³ In the next stage, the Court addressed the role and authority of the arbitrator at the threshold of the arbitral process. Parsing to some extent Chief Justice Rehnquist's dissenting analysis in *Bazzle*,¹⁶⁴ the Court in effect divided the preliminary jurisdictional concerns into a variety of analytical categories: substantive arbitrability, interpretive arbitrability, procedural arbitrability, and subject-matter arbitrability. Courts were to decide matters of substantive arbitrability because it related to the question of what the parties had agreed.¹⁶⁵ Under FAA § 3, federal district courts rule on whether the parties had agreed to arbitrate and whether that agreement covered the dispute at issue.¹⁶⁶ In *Kaplan*,¹⁶⁷ the Court recognized the legal significance and remedial importance of an arbitration agreement;¹⁶⁸ it also emphasized the role of contract freedom in arbitration law by ruling that parties could agree to delegate the power to decide jurisdictional challenges to the arbitrators.¹⁶⁹ Accordingly, whether the parties agreed to arbitration was to be decided by courts, unless the parties "clearly and unmistakably" provided otherwise.¹⁷⁰

The authority of courts to decide jurisdictional issues at the head of the arbitral process not only could be restricted by party agreement, but it was further narrowed by subsequent case law. Under the Court's ruling in *Bazzle*,¹⁷¹ arbitrators were vested with the authority to interpret the arbitral clause.¹⁷² The power to interpret arbitrability allowed the arbitrator to declare what the arbitral clause provided. The judicial role was confined to identifying the existence of an arbitration contract; the court's interpretative powers were surrendered to the arbitrator as a matter of law.¹⁷³ The arbitrator, then, possessed sovereign decisional authority over both the contract and the arbitral clause.¹⁷⁴ Judicial supervision at the head of the arbitral process was significantly reduced. Once a court ascertains the existence of an agreement to arbitrate, the arbitrator decides all other issues in the litigation, including the content and meaning of the arbitral clause. In *Bazzle*, the question of litigation

163. See sources cited in notes 159-62, *supra*.

164. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455-60 (2003) (Rehnquist, J., dissenting).

165. See *id.*

166. 9 U.S.C. § 3.

167. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

168. See *id.*

169. *Id.*

170. *Id.*

171. See *supra* note 164 and accompanying text.

172. See *id.*

173. See *id.*

174. See *id.*

was whether the arbitration agreement allowed class action litigation.¹⁷⁵ The Court's ruling never resolved the issue of class litigation in arbitration, but rather relegated that and similar questions to the arbitrator's discretion in each case.

Matters of so-called procedural arbitrability¹⁷⁶ are best illustrated by the issue of waiver. When a party to an arbitration agreement files and pursues a judicial action or motion relating to an arbitrable dispute, its conduct might result in the abandonment of its right to arbitrate.¹⁷⁷ Ordinarily, prior to the Court's ruling in *Howsam*,¹⁷⁸ such an issue implicated directly the enforceability of the contract of arbitration and, therefore, came within the ambit of FAA § 3 and court authority.¹⁷⁹ The current law places the resolution of such issues squarely within the decisional power of the arbitrator. The Court again pushed the judiciary out of the preliminary phase of the process and enhanced the arbitrators' role in establishing the foundation for their decisional authority.¹⁸⁰ When these rulings on arbitrator sovereignty are combined with *Kaplan* and the Court's liberal rulings on subject-matter arbitrability, the result is the complete exclusion of courts from the front-end of the arbitral process.¹⁸¹ The consequence is to enhance the autonomy and independent operation of the arbitral process under U.S. law. The Court's objective in these rulings seems to have been to eliminate or at least reduce significantly the litigation about arbitration and to allow the recourse to arbitration to have its projected impact upon court dockets.¹⁸²

V. CONCLUSION

National courts can play a vital role in giving arbitration a function in the operation of the legal system. Judicial decisions can transform legislative enactments on arbitration into either meaningful or empty regulatory provisions. The New York Arbitration Convention is recognized as the modern-day charter of international arbitration.¹⁸³ Article V(2)(b) of the Convention recognizes that public policy can serve as a defense to the enforcement of international arbitral awards.¹⁸⁴

175. *See id.*

176. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (para II) (2002).

177. *See id.*

178. *Id.*

179. 9 U.S.C. § 3.

180. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-52 (2003).

181. *See* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 236-37 (4th ed. 2007) [hereinafter CARBONNEAU, ARBITRATION LAW AND PRACTICE].

182. *See id.* at 238.

183. *See supra* note 1 and accompanying text.

184. *See supra* note 1 at art. V(2)(b).

National courts, however, establish what public policy actually means in the circumstances of individual cases. It is at this point in the legal process that true regulatory power resides. In fact, as noted earlier,¹⁸⁵ in an attempt to foster the development of international commercial arbitration, French courts developed and administered a concept of "international" public policy, declaring that this less demanding standard regulated the enforcement of transborder awards.

The U.S. Supreme Court went one better. When it was confronted with the circumstances of international litigation,¹⁸⁶ the Court began to develop, perhaps for the first time in the history of the U.S. legal system,¹⁸⁷ the basic tenets of a private international law to address the legal questions generated by that form of litigation.¹⁸⁸ It concluded that contract freedom was the most effective and efficient regulatory principle in transborder commercial matters.¹⁸⁹ The Court also emphasized the need to enforce the parties' agreement to submit disputes to arbitral adjudication.¹⁹⁰ It reinforced and expanded the arbitrators' authority to rule, as well as the finality of arbitral awards.¹⁹¹

The shaping and systemic stature of arbitration depend upon the judicial response to the process. As Jean Robert said years ago,¹⁹² judges must be persuaded of the doctrinal merit and practical virtues of arbitration and the ability of arbitrators to shoulder the burdens of adjudication. The endorsement of arbitration also implies recognition of the limitations of the methodology of judicial litigation,¹⁹³ that the pursuit of the national interest or justice can require a commitment to a non-sectarian and enlightened policy,¹⁹⁴ and that alterations in human civilization demand an adjustment by local legal systems.¹⁹⁵ The continuing English reticence toward arbitration is a relatively safe position given its more circumscribed contemporary character, the universality of the English language in world commerce, the importance of the common law, and the quality of the arbitration bar in London. It still, however, comes at a price. It is one thing to have courts correct

185. See Carbonneau, *Elaboration*, *supra* note 28, at 36-40; *supra* notes 102-04 and accompanying text.

186. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 n.16 (1972).

187. See CARBONNEAU, *ARBITRATION LAW AND PRACTICE*, *supra* note 181, at 669-72.

188. See *id.*

189. *Id.*

190. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974), *reh'g denied*, 419 U.S. 885 (1974).

191. See *generally* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

192. Interview of Maître Jean Robert in Paris, France (Oct. 14, 1979).

193. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 15, at xv-xxiv, 57-76.

194. See *id.*

195. See *id.*

salient, exceptional abuses of the process; it is quite another matter to distrust the decisional capabilities of the arbitrators by continuing to incorporate safeguards against arbitral decisions in the statutory law.

The retention of a would-be judicial safety valve is not a practice that will advance the interests of arbitration, society, or global commerce. Admitting to the failures of judicial litigation and recognizing the need to transcend parochial views of legality constitute a better practice and policy.¹⁹⁶ If arbitration is to remain successful, the shadow of vestigial doubts must be extinguished through the light of unconditional acceptance. Law is but a lifeless platitude when it cannot be applied effectively to the resolution of disputes.

Arbitration serves a two-fold fundamental purpose: It allows States to transcend parochial differences in legal process, regulatory policies, and political ideology and enables their citizens to engage in the business of international commerce. The latter not only spreads prosperity, but it also fosters democratic values and freedom on a worldwide basis even in the most resistant States. At a domestic level, arbitration has permitted the United States to maintain and reinforce the democratic character of American society by empowering a class of Americans, often neglected and ignored by the legal system, to have a right of redress of their grievances. Further, it allows merchants and companies to expend more resources on their commercial activities by supplying them with a frugal, fair, and final form of expert and effective adjudication. The Court's activity on arbitration during the last forty years has created a new civil procedure that warrants the attention, support, and endorsement of all American citizens. The legal experimentation with arbitration needs to continue to shape the character of American economic relations, society, and democracy.¹⁹⁷

196. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 n.16 (1972).

197. But see Arbitration Fairness Act of 2007, S. 1782 and H.R. 3010, 110th Cong. (2007). "The stated purpose of the bills is to dismantle the process of mandatory arbitration in disparate-party transactional circumstances: '[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.' *Id.* It also eliminates, apparently in all arbitration circumstances, the jurisdictional or *kompetenz-kompetenz* powers of the arbitrator: '[T]he validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.' *Id.* The latter provision reverses or eliminates the effect of the separability doctrine. It also seems to eliminate any reference to state contract law and to create—wholesale—a special federal law of contracts applying exclusively to arbitration agreements. This federal contract law for arbitration propounds the limited validity of arbitration contracts and places particular encumbrances upon their range of application. In effect, if the bill is enacted into law, the U.S. Congress will

discriminate against arbitration as a form of contract by placing disabling requirements upon it in certain transactions. By so doing, the Congress will be engaging in conduct that the U.S. Supreme Court forbade to the states for years through the federal preemption doctrine.

"Finally, in keeping with Justice William O. Douglas' legacy on arbitration, the proposed legislation 'exempts arbitration in collective bargaining agreements' from the regulation established in the legislation. Justice Douglas was a virulent critic of arbitration in all circumstances but those of labor-management relations. Like Justice Douglas, the proponents of the legislation approve of the traditional role of arbitration in achieving industrial self-governance in the unionized workplace. In their view, union representation establishes a sufficient level of protection to guarantee the essential fairness of this application of arbitration. It is again interesting to note that the federal decisional law, especially the rulings of the U.S. Supreme Court, arrives at a diametrically opposed conclusion. In the latter, the Court believed that the union's collective interest prevented union members from asserting their personal acquiescence to the arbitrability of their individual statutory rights through the union. As a result, the individual union member needed to affirm personally the arbitrability of disputes involving citizenship guarantees. In the final analysis, it is difficult to comprehend why an employee's interests are seen as advantaged in one form of arbitration and not the other.

"It should be emphasized that the stated purpose of the proposed legislation not only bans arbitral clauses in the identified transactional circumstances, but it also prohibits the arbitrability of civil rights disputes on a subject matter basis. Both aspects of the bills stand in contradistinction to the U.S. Supreme Court's long-standing decisional law on arbitration. The latter provides for a wide, if not unlimited, rule of arbitrability that is not constrained by subject-matter considerations or transactional inequality. The Court's objective in devising this law was to guarantee citizen access to a functional and effective process of adjudication. The proposed law simply bans arbitration without creating more courts, naming judges to unfilled positions, or correcting the abuses and dysfunctionality of judicial litigation."

See Thomas E. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233, 246-49 (2007).